MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-167

UNITED STATES RAILWAY ASSOCIATION,
Appellant

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *Appellee*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The undersigned, Trustees of the Reading Company (Reading), currently in reorganization (Bky. No. 71-828, E.D. Pa.), respectfully move this Court for leave to file the accompanying brief *amicus curiae*. The consent of attorneys for the appellees was requested but unanimous consent was refused.

On July 1, 1974, pursuant to §207(b) of the Regional Rail Reorganization Act of 1973 (Act), the reorganization court of Reading, in Order No. 650, determined that it could not conclude that the Act provided a process which was unfair or unequitable to Reading. Immediately prior to the printing of this brief, the Special Court, created by §209(b) of the Act, affirmed this order. The significance of this order is that the property in the estate of Reading shall be available for inclusion in the Final System Plan to be devised by the United States Rail Association (USRA), created by §201(a) of the Act, which Plan shall be certified to the Special Court pursuant to §209(c).

While the court below was convened to consider the constitutionality of the Act, including the provisions regarding the formulation of the Final System Plan, in the context of only the Penn Central reorganization proceedings, the Court rendered an apparently expansive judgment declaring §304(f) of the Act unconstitutional on its face. Accordingly, the Court enjoined USRA from certifying to the Special Court a Final System Plan *per se* and not merely a Plan which included Penn Central properties, even though the evidence on which the injunction was based related exclusively to the record of the Penn Central proceedings.

Herein lies the interest of the *amicus* in the instant litigation. For if the injunctive relief granted below is upheld, it will preclude the inclusion of Reading properties in the Final System Plan by functionally extinguishing the Final System Plan itself. Specifically, sanctioning the

grant of injunctive relief will have the effect of collaterally undermining the jurisdiction of Reading's reorganization court to determine that it should be subject to the processes of the Act, and vitiating the express provision of the Act that the review of such determination shall lie exclusively with the Special Court. (§207(b)).

Given the ramifications of permitting such a collateral attack, the *amicus* urges that that such attack should not be permitted. The *amicus* suggests that the injunctive relief granted by the Court below should therefore be expressly circumscribed to enjoin USRA, if at all, from certifying to the Special Court only a Final System Plan which includes properties of Penn Central and not a Final System Plan *per se*.

The Trustees of Reading therefore respectfully request this Court to grant permission to file the annexed brief.

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STATEMENT OF INTEREST

The Trustees of the Reading estate, quite obviously, have a very direct and immediate interest in discharging their responsibilities to preserve the estate and rehabilitate it as a viable going concern. Towards that end, the Trustees believe that it is in the best interest of the estate to be subject to the processes of the Regional Rail Reorganization Act of 1973 (Act), with its panoply of protective and rejuvenative features. Accordingly, the Trustees basically support the positions of the appellants in this litigation, the United States Rail Association (USRA) in No. 74-167 and the United States in No. 74-168.[1]

The fact that the Trustees, on behalf of the public and creditors of the estate, have a large financial stake in the outcome of this litigation distinguishes their interest from that of the appellants, whose interest is to discharge their legislatively mandated executive and governmental responsibilities. Because of this distinguishing feature, the Trustees believe that they are in a unique position to complement the arguments proffered by the appellants in support of the constitutionality of the Act, and that because of their fiduciary obligations it is incumbent upon them to offer such complementary support.

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1. To the extent that the appellant's positions are divergent with respect to their interpretation of the lower court's judgment (compare the brief of USRA, p. 62, interpreting the lower court's judgment that §304(f) is null and void to mean that §304(f) is unconstitutional on its face, with the brief of the United States, p. 16, which states that the lower court did not declare §304(f) invalid on its face), the *amicus* concurs with USRA's interpretation of the lower court's judgment.

ARGUMENT

The Act, and specifically §304(f), is constitutional as applied to Reading, and therefore, cannot be unconstitutional on its face.

The nub of the three-judge court's constitutional adjudication is found in paragraph 4.b. of its order, wherein it declared:

> That §304(f) of the Regional Rail Reorganization Act of 1973 is null and void as violative of the Fifth Amendment of the United States Constitution, *to the extent that it would require continued operation of rail services* at a loss in violation of the constitutional rights of the owners and creditors of a railroad. (emphasis added)

Unhappily, the meaning of the entire clause explaining the reason why §304(f) is unconstitutional, is itself not free from doubt, and in particular the italicized portion of the clause. It is, however, fair to suggest that since only USRA, by the terms of §304(f), has power to require continued operation of rail services, the court construed §304(f) as conferring authority on USRA to forbid abandonment of rail operations even where the Fifth Amendment would command an abandonment of such rail operations to avoid an unconstitutional (because uncompensated) taking. The declaration that §304(f) was therefore unconstitutional (apparently on its face) inexorably followed.

In *State of Texas v. Eastern Texas Railway Co.*, 258 U.S. 204 (1922), the Supreme Court was confronted with a similar issue of statutory construction when it was called upon to construe a provision of the Transportation Act of 1920 which imported §1(18) into the Interstate Commerce Act. That section, in pertinent part, provided that ". . . no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the [ICC] a certificate that the present or future

public convenience and necessity permit of such abandonment." (49 U.S.C.A. §1(18)).

The State of Texas alleged that Congress, in enacting §1(18), authorized the ICC to grant permission to a carrier to abandon wholly *intra*state rail operations, and not merely *inter*state operations, and that as such, Congress unconstitutionally exceeded its power (presumably under the Commerce Clause). The Court, however, construed §1(18) as authorizing the ICC to sanction abandonments of only *inter*state rail operations, and not *intra*state operations, expressly heeding the canon of statutory construction that where a statute is susceptible of two constructions, one of which raises grave constitutional questions and the other which avoids such questions, the Court's duty is to adopt the latter.

Departing from the above canon of statutory construction, the three-judge court, in the instant case, construed §304(f) as unconstitutionally authorizing USRA to forbid abandonments which the Constitution itself would mandate. A more reasonable construction, one which comports not only with the presumptive validity of an act of Congress but also the historical principle of statutory construction enunciated by this Court, would have read §304(f) as investing USRA with authority to compel continued rail operations only where such compulsion would not violate the Constitution.

As noted above, the lower court's opinion reasonably suggests that it construed §304(f) as authorizing USRA to forbid an abandonment of rail operations even where the Fifth Amendment would require an abandonment. Under what circumstances then would the Fifth Amendment require such abandonment?

The lower court states in paragraph 4.b. of its declaratory judgment that the Fifth Amendment mandates abandonment where rail operations cannot be maintained except "at a loss." While free from patent ambiguity, the *amicus* submits that this language suffers from latent ambiguity, in that it can reasonably mean either of the following when

taken in conjunction with the court's construction of USRA's authority: first, it can mean that Congress has authorized USRA to compel continued rail services of a carrier in reorganization at a loss, where such loss results in an interim erosion (i.e. actual diminution in value) of the debtor's estate to the extent that the property of pre-bankruptcy creditors is taken in violation of the Fifth Amendment; or secondly, it can mean that Congress has authorized USRA to compel continued rail services at a loss (even if such deficit operations do not cause an interim erosion, due to the simultaneous appreciation in the value of the property in the estate) where no reasonable prospect of profitability exists within the proscription of *Brooks-Scanlon v. Railroad Commission of Louisiana*, 251 U.S. 396 (1920). By either interpretation, the application of §304(f) to the estate of Reading Company is constitutional, in that, first, Reading is suffering no interim erosion, and secondly, Reading does indeed have a reasonable prospect of profitability.

During the course of the "180 day" hearings held by Reading's reorganization court pursuant to §207(b) of the Act, Julian Green, then Reading's Vice-President, Finance, testified that the estate was suffering no interim erosion since the projected net loss was based on annual depreciation of approximately $10,000,000 while the estate was benefiting from the simultaneous appreciation in value of real and personal property in the estate of approximately $11,000,000. His determination of the amount of appreciation was based on the minimum value reasonably assignable to assets in the estate, that of net liquidation value as reflected in the Day and Zimmerman study prepared in January, 1972, and a modest inflation factor of 5% to 8%. Indeed, the credible and uncontradicted testimony of Mr. Green can reasonably support the judgment that the estate of Reading is experiencing a net appreciation, even considering projected net operating losses. Parenthetically, it should be noted that the projected net loss, in itself, is questionable since subsequent to his testimony Reading has

enjoyed net income for the months of August and September, 1974, in the respective amounts of approximately $400,000.00 and $500,000.00. Surely his testimony supports the judgment that the estate is suffering no interim erosion.[2]

With respect to the proposition that Reading has a reasonable prospect for profitability, on January 2, 1974, the effective date of the Act, joint study committees previously formed by the Reading Company and the Lehigh Valley Railroad Company, both in reorganization under §77, formulated and published a joint plan of reorganization.[3] This plan proposed the formation of a Mid-Atlantic Railroad Company (MARC), which would be the consolidation of selected economic lines of the above companies, as well as those of the Central Railroad Company of New Jersey and the Lehigh and Hudson River Railway Company (also in reorganization under §77). The results of this study indicate with reasonable certainty that there is a genuine and substantial prospect of profitability for the estate of Reading as augmented by the economic lines designated in the MARC plan, and that such profitability can be reasonably assured within five (5) years, given, of course, the assistance available in reorganization pursuant to the provisions of the Act.[4]

Hence, under either of the above possible interpreta-

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2. The Special Court, in its opinion of September 30, 1974, pursuant to §207(b) of the Act, similarly concluded that ". . . There is no substantial likelihood that Reading will experience interim erosion . . ." (Slip opinion, p. 55, n. 50).

3. Because of the length of the Plan, and the fact that it is replete with detailed charts, graphs and financial projections, inclusion in an appendix was thought to be of limited usefulness to the Court. If the Court desires to review the Plan, however, copies shall be promptly provided.

4. The consolidation envisioned by the MARC Plan has recently been given genuine viability by the decision of the Special Court. Pursuant to §207(b) of the Act, the Special Court decided that the properties of the above carriers will be available for inclusion in the Final System Plan called for in §303(c) of the Act.

tions to be given the reasoning of the three-judge court, §304(f) as applied to Reading is demonstrably constitutional. While the impingement of §304(f) on the Fifth Amendment may have presented a concrete, justiciable controversy with respect to the Penn Central estate, this controversy does not exist with respect to the Reading estate, since under neither of the above possible meanings does the application of §304(f) to the estate of Reading violate the Fifth Amendment.

The fact that a statute is unconstitutional, as applied to one party does not permit a court to reason inductively that the statute is therefore unconstitutional on its face, and hence unconstitutional as applied to all parties. While concededly the federal courts have the power to declare an act of Congress unconstitutional, it is a power subject not only to constitutional constraints but also judicially self-imposed restraints. As this Court stated in *Liverpool, New York & Philadelphia SS Co. v. Commissioners of Emigration*, 113 U.S. 33 (1885):

> "This court, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other *never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.*" (p. 39, emphasis added).

The declaratory judgment issued by the three-judge court in the instant case clearly violated the latter rule of judicial self-restraint. If the lower court had any doubts as to the constitutionality of §304(f) as applied to Penn Central, it need only have declared that the application of §304(f) to the estate of Penn Central produced an unconstitutional result, and not the seemingly broad-based declar-

ation that §304(f) was unconstitutional on its face. The declaratory judgment issued by the lower court must therefore be expressly circumscribed to indicate that §304(f) is not unconstitutional on its face, but rather, if at all, only in its application to the estate of Penn Central.[5]

The three-judge court should have deferred to the various reorganization courts for the determination of when the Fifth Amendment overrides §304(f).

While it may be conceded that the convening of the three-judge court, pursuant to 28 U.S.C.A. §§2282 and 2284, was technically proper in view of the colorable constitutional claim on the part of the plaintiffs, nonetheless the three-judge court should, as a matter of judicial self-restraint, have abstained from passing upon the constitutional issues. The three-judge court should have deferred to the respective reorganization courts for their various determinations if and when the Act, including §304(f), operates to violate the taking clause of the Fifth Amendment. Because the application of the absention doctrine to §77 reorganization proceedings was expressly considered in *The New Haven Inclusion Cases*, 399 U.S. 392 (1970), a review of the facts of those cases in some detail is warranted.

On November 16, 1967, the ICC determined the price to be paid by Penn Central for the assets of the New Haven estate to be included in the merged Penn Central system. On January 23, 1968, the New Haven bondholders commenced five (5) separate actions in the District Court for

5. While the lower court in the declaratory judgment portion of its order did not limit its constitutional holding with regard to interim erosion to the precise facts presented by the Penn Central operations, clearly those facts inspired its consideration of the §304(f) interim erosion issue in the body of its opinion. See Typed Opinion pp. 29-35. Whether the declaratory judgment suffers merely from infelicity of expression which obscures the lower court's intent to render a constitutional adjudication limited to the facts before it, or whether the court intended to render an expansive constitutional adjudication, the judgment in any event must be expressly circumscribed to apply only to the facts before the lower court.

the Southern District of New York, seeking to have the ICC order set aside; a three-judge court was therefore convened pursuant to 28 U.S.C.A. §2283. On March 29, 1968, the ICC certified the sale (including the price) of the New Haven assets to the latter's reorganization court sitting in Connecticut; pursuant to §77(e) the New Haven bondholders also objected to the price in this forum. Thus the identical question of price came at the same time before the three-judge court in New York and the reorganization court in Connecticut.

The three-judge court in New York, in rejecting motions to dismiss the action in that forum, noted that while concurrent jurisdiction was awkward, technically the bondholders' actions to secure a three-judge court review of the ICC order were correct (by virtue of 28 U.S.C.A. §2283), and that therefore, the three-judge court should retain jurisdiction. Both forums then proceeded to render conflicting judgments on the merits, appeals from which were taken and consolidated for joint consideration by this Court.

While not disturbing the three-judge court's finding that it technically had jurisdiction in the matter, this Court indicated that the circumstances of the case did not inexorably command review in both forums, as the reorganization court had plenary authority to render a decision on the merits. Accordingly, it was suggested that the three-judge court might well have stayed its hand under the traditional principle that the court which first acquires jurisdiction through the possession of property in any particular matter is vested to hear and determine all controversies relating thereto. Noting that regard for this principle was particularly acute in §77 reorganization proceedings, the Court therefore vacated the judgment of the three-judge court, stating:

> "In short, with identical issues before the two courts . . . with congruent standards of review . . . the three-judge court should have stayed its hand in the New Haven bondholders litigation." (footnote omitted, p. 428).

The fact that in the instant case a three-judge court was convened pursuant to 28 U.S.C.A. §§2282 and 2284 to determine the constitutionality of federal legislation neither defeats the policies underlying the abstention doctrine nor distinguishes the instant case from the *New Haven Inclusion Cases*, *supra*. The policies underlying §77 in reinforcing the primary jurisdiction of each reorganization court to consider all controversies relating to property before those courts are equally applicable to constitutional as well as "mundane" controversies.[6]

If each reorganization court is separately permitted to determine the impact of the interplay between §304(f) and the Fifth Amendment on each estate, this will promote the principle that a rule of constitutional law is never formulated on grounds "broader than is required by the precise facts to which it is to be applied." *Liverpool*, *supra*. The §207(b) 180-day proceedings pursuant to the Act illustrate the essentially *ad hoc* nature of formulating such a rule, and hence the importance of deferring to the primary jurisdiction of each reorganization court. While Judge Fullam, Penn Central's reorganization court, in Order No. 1596, decided in essence that Penn Central should not be subject to the processes of the Act on constitutional grounds, Judge Ditter, Reading's reorganization court, in Order No. 650, dismissed as prematurely raised similar constitutional objections, given the facts peculiar to the Reading estate, and in essence determined that Reading should be subject to the processes of the Act. To permit this particularized judgment to be thwarted by an expansive constitutional holding of the lower court, based on facts

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6. Judge Fullam, in his separate and concurring opinion in the lower court, considered whether that court should defer to the various reorganization courts in determining the various constitutional issues activated by §207(b) proceedings under the Act. He decided against deferral on the grounds that "the deliberate and collegial judgment of this three-judge court" should prevail to determine those issues. (See separate opinion, pp. 4-5). It is submitted that this rationale should not prevail over the traditional principle of judicial deference to the primary jurisdiction of the reorganization courts.

wholly alien to the record in the Reading matter, would seriously undermine the above principle.

Moreover, the fact that the injunctive relief granted by the three-judge court, enjoining USRA, *inter alia*,

> ". . . from taking any action to enforce the provisions of §304(f) of the Regional Rail Reorganization Act of 1973, with respect to any abandonment, cessation, or reduction of service *which has been or may hereafter be determined by a court of competent jurisdiction* to be necessary for the preservation of rights guaranteed by the United States Constitution," (emphasis added),

is not self-executing, but rather dependent upon the subsequent adjudication of a reorganization court, indicates the prematurity of the lower court's judgment and further militates in favor of deferral by that court to the respective reorganization courts. The tentative nature of the injunctive relief granted tacitly recognizes that it is not within the province of the three-judge court to declare when continued deficit operations compelled by §304(f) violate the Fifth Amendment, but rather that such a determination rests exclusively within the "sound discretion of the reorganization court." *In re New York, New Haven and Hartford Railroad Co.*, 330 F.Supp. 131, 147 (D. Conn. 1971) *rev'd. on other grounds*, 457 F.2d 683 (2d Cir. 1971), *cert. den.*, 409 U.S. 890 (1971).

The desirability of deferring to each reorganization court in passing upon the constitutionality of the Act as applied to each estate is demonstrated by the instant proceedings. This Court is now called upon to adjudicate the constitutionality of the Act based on the facts present in the record of only one of the seven affected railroads in reorganization. As pointed out above, the facts present in the Reading record do not in any way support the judgment of the lower court, and moreover militate against it, as may be the case with the records of the other affected railroads.

The judgment of the lower court should therefore be vacated, for any constitutional claims can be presented to the respective reorganization courts, which are uniquely situated to assess the validity of such claims.

The injunctive relief granted was improper, in that it should have been more limited in scope.

While the *amicus* concurs in the position of the appellants, USRA and the United States, that the injunctive relief granted was overbroad even if appellants' arguments were rejected on the merits, we wish to offer yet another reason for delimiting the scope of injunctive relief granted. Upon this reason rests the entire interest of the *amicus* in this matter.

In the first paragraph of its order granting injunctive relief, the three-judge court declared that:

> ". . . the defendant, United States Railway Association, is enjoined from certifying a Final System Plan to the Special Court pursuant to §209(c) of the Regional Rail Reorganization Act of 1973."

By granting such sweeping relief to protect the estate of Penn Central from an unconstitutional taking, the three-judge court in effect used a blunderbuss where only a pistol was required.

Although the three-judge court, in the declaratory judgment portion of its order, seemingly declared §304(f) unconstitutional on its face, it is reasonably clear that the injunctive relief which flowed therefrom was primarily aimed at protecting the estate of Penn Central from an unconstitutional taking occasioned by §304(f).[7] If so, then the lower court need only have enjoined USRA from certifying a Final System Plan under §209(c) *which included any properties of Penn Central*, and need not have enjoined the certification of the Final System Plan *per se*.

7. See n. 3, *supra*, and the opinion of the lower court (Typed opinion pp. 29-35).

If a federal court should not formulate a rule of constitutional law "broader than the facts to which it is to be applied", then *a fortiori*, a federal court should not issue injunctive relief broader than the facts to which it is to be applied.[8] To give meaning to this logical inference in the instant case requires that this Court circumscribe the scope of injunctive relief granted in the first paragraph of the lower court's order, and enjoin USRA, if at all, only from certifying a Final System Plan which includes Penn Central properties, and *not* enjoin USRA from certifying the Plan *per se*. In this manner, the court could tailor the injunctive relief sought to the specific facts presented before the court below, and in doing so would recognize the plenary authority of the reorganization court of Reading to determine that its estate shall be subject to the process of the Act, and hence its properties available for inclusion in any Final System Plan.[9]

Finally, it is important to note that a decision by this Court declaring that the Act is unconstitutional as applied to Penn Central and enjoining USRA from certifying only a Final System Plan which includes Penn Central properties, will not materially frustrate the Congressional purpose in assuring continued rail operations in the midwest

8. Even assuming a statute is unconstitutional, injunctive relief is not necessarily appropriate. *Younger v. Harris*, 401 U.S. 37 (1971). Especially where the allegation that a statute allegedly violates the Fifth Amendment rests upon a disputed questions of fact, a court should refrain from issuing injunctive relief. *Knoxville v. Knoxville Water Co.*, 189 U.S. 434 (1909).

9. Such a determination was made by the reorganization court of Reading on July 1, 1974, in the context of §207(b) proceedings under the Act. This determination was affirmed on September 29, 1974 immediately prior to the printing of this brief by the Special Court pursuant to §207(b). Also, it is of interest to note that the Special Court reversed the determination by Judge Fullam, Penn Central's reorganization court, that Penn Central properties would not be available for inclusion by USRA in a Final System Plan. In doing so, the Special Court rejected Judge Fullam's position regarding the unconstitutionality of the Act.

and northeast regions of the United States.[10] The consolidation of Reading and other railroads currently in reorganization in the manner envisioned by the MARC Plan mentioned above will provide a viable carrier capable of meeting the passenger and freight needs in these regions.

CONCLUSION

For the above reasons, the judgment of the lower court should be vacated.

In the alternative, the judgment of the lower court should be modified to indicate that §304(f) (and hence §303(c)) is not unconstituional on its face, but rather, if all all, only in its application to the estate of Penn Central.

Accordingly, the first paragraph of the lower court's order enjoining USRA from certifying a Final System Plan to the Special Court should likewise be modified to enjoin USRA, if at all, from certifying only a Final System Plan which includes properties in the estate of Penn Central, and not from certifying a Final System Plan *per se*.

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10. Note that Congress, in §604 of the Act, expressly provided that should the application of the Act to any party be held invalid, the application to other parties shall not thereby be likewise invalid.